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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

HARLEY E. ROWE,

Petitioner,

v.

CITY OF ELYRIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the 13th Amendment to the US Constitution applies to white persons as well as minorities.

Whether a city is entitled to enforce it's ordinances in an arbitrary and unreasonable manner even if they are enacted in a lawful manner.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Harley E. Rowe, an individual white citizen of the United States, residing in the Northern District of Ohio. Petitioner has no corporate affiliations. Harley E. Rowe was the Plaintiff in the District Court and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Respondents are the City of Elyria, the Elyria City Council, the head of the Building Department for the City of Elyria and an employee of the Safety Service Department for the City of Elyria. Petitioner is unaware of any corporate affiliations regarding the Respondents. The Respondents were the Defendants in the District Court and the Appellees in the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion is reported at 2002 U.S. App. LEXIS 11181 (6th Circ. Ohio June 6, 2002) [App. A at 1a], and the District Court opinion [App. B at 14a] is not reported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on June 6, 2002. A timely petition for Writ of Certiorari has been filed by Petitioner. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1331 & 1341.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions:

A. 42 U.S.C. 1983, the Civil Rights Act.
B. 13th Amendment, U.S. Constitution prohibiting slavery and involuntary servitude.

STATEMENT OF THE CASE

This is a civil action involving claims for violations of Plaintiff's civil rights by the city and its employees. This case also involved a request for an injunction, a declaratory judgment and money damages regarding the aforementioned claims (R. 1, Complaint).

In 1986, Mr. Rowe purchased a service station business known as the West River Marathon gas station and located at 803 West River Road in Elyria, Ohio. Mr. Rowe had no problems with the city or any of its agents or employees until 1995. In 1995, Mr. Rowe was prosecuted for failing to pay charges assessed by the city for alleged false alarms at his business (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 17-20). This matter involved less than a $200 charge for these alleged false alarms but Mr. Rowe went to trial over this issue because he belived that he was not in violation of this city ordinance. The court therein found Mr. Rowe not guilty of the charges based on the fact that the city could not prove that the alarms were false (R. 27, Exhibits by Defendants, Exhibit C, Referee's Report). This is when the trouble started for Mr. Rowe with the city of Elyria.

Over the next several years up to the present time, Mr. Rowe was prosecuted, cited, assessed, charged and otherwise targeted by the city of Elyria through its agents and employees from various city departments. Mr. Rowe described in his complaint a laundry list of events in which he was continually harassed and targeted for alleged violations of various city ordinances (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 17-20); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 37-45); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 46-60); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 62-88); (R. 27, Exhibits by Defendants, Rowe

Dep. TR pages 89-97); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 97-101); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 109-134); and (R. 27, Exhibits by Defendants, Exhibit A, Answers to Interrogatories).

The foregoing actions by and through the city resulted in the filing of a complaint in federal court in June 29, 1999 by Mr. Rowe. (R. 1, Complaint). Mr. Rowe filed his action in the federal district court, the Northern District of Ohio, Eastern Division, wherein all the parties resided. The district court below was presented with federal questions involving a claims under the Civil Rights Act, 42 U.S.C. Section 1983 and the 13th Amendment to the U.S. Constitution along with state claims based on the same facts described in the complaint. Pursuant to 28 U.S.C. 1331 & 1343, the district court had jurisdiction of this matter.

The Defendants filed Motions for Summary Judgment and to Dismiss (R. 26, Motion by defendant). The Plaintiff responded to the Motions (R. 30, Response by plaintiff). The judge at the district court granted the Motions in an Order filed on November 30, 2000 (R. 32, Order). Mr. Rowe claims violations of his civil rights by the city of Elyria and its employees. Mr. Rowe presented a laundry list of incidents in his complaint that happened to him over the years based on actions by employees of the city. Mr. Rowe was deposed about these incidents and was specific about what happened, when they happened and who was involved from the city. Despite this detail of the numerous incidents, the district court held that Mr. Rowe had not produced a single issue of fact for a jury to consider or any evidence of damages that showed a violation of his civil rights. This is clearly not what the evidence showed and would have shown to a jury. The judge erred by granting the defendants motions and by not having a hearing on the merits.

The Plaintiff-Appellant filed a timely Notice of Appeal from this Order on December 28, 2000 (R. 34, Notice of Appeal). The Sixth Circuit Court of Appeals heard the appeal and issued a Decision affirming the District Court decision on June 5, 2002. It is from these Decisions that the petitioner is asking the Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Sixth Circuit Is Incorrect

A Motion to Dismiss, under Fed. R. Civ. P. 12(b)(6), may be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King and Spalding*, 467 U.S. 69, 73 (1984); and *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir., 1996).

A Motion for Summary Judgment, under Fed. R. Civ. P. 56, may be granted "if the evidentiary material on file shows that there is no genuine issue as to any material fact ..." *White v. Turfway Park Racing Ass'n. Inc.*, 909 F.2d 941, 943 (6th Cir.,1990). See also, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (1989); *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); and, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986).

Some cases have been dismissed becuase there was no evidence proffered to show a genuine issue of fact for a trial on the merits. *Fulson v. City of Columbus*, 801 F. Supp. 1 (S.D. Ohio, 1992). See also, *White v. Turfway Park Racing Ass'n. Inc.*, 909 F.2d 941, 943 (6th Cir.,1990); *Jackson v. City of Columbus*, 67 F. Supp. 2d 839 (S.D. E.D., (Ohio)

1998); and *Cuevas v. Hardy*, 2000 U.S. Dist. LEXIS 1632 (W.D. S.D., Mich.).

The case at bar is distinguishable from these cases.

In other cases, the appellate court reversed the trail court's granting of a dismissal or summary judgment because there were issues of fact that needed to be heard and determined by a jury. *Village of Willowbrook v. Olech,* 528 U.S. 562, 145 L.Ed.2d 1060, 120 S. Ct. 1073 (2000); *Hishon v. King and Spalding*, 467 U.S. 69, 73 (1984); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, *106 S. Ct. 2505 (1986); Adickes v. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); *Simi Investment Co. Inc. v. Harris County,* 236 F. 3d 240 (C.A. 5 (Tex.) 2000); *Curto v. City of Harper Woods*, 954 F.2d 1237 (C.A.6 (Mich.) 1992); and *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir., 1996). This is what Mr. Rowe wants, the chance to show and prove to a jury that what the city of Elyria did to him and his business was a violation of his rights. Mr. Rowe requests that a jury decide this issue and not the judge.

In *Hishon*, Justice Powell stated in his concurrence that the "petitioner is entitled to the opportunity to prove these averments." Id at page 69. In *Anderson*, the Court stated that "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id at page 216. In *Adickes*, Justice Black stated in his concurrence that "The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." Id at page 164. Justice Black went on to state that "The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by

substituting trial by affidavit and the sterile bareness of summary judgment." Id at page 165.

II. The Question Presented Is Important.

The standard regarding appellate review of zoning ordinances has been stated by this court in *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L. Ed.2d 797, 94 S. Ct. 1536 (1974) and by the appellate court in *Schenk v. City of Hudson*, 114 F.3d 590 (C.A.6 (Ohio) 1997). "In reviewing a zoning ordinance, a federal court may only consider whether legislative action is rationally related to legitimate state land use concerns." Id at page 593. In the case of *Village of Terrace Park v. Errett*, 12 F.2d 240 (C.A.6 (Ohio) 1926), the appellate court stated that it would not interfere with a municipality's exercise of it's police power, unless it was arbitrary or unreasonable.

This Court has also discussed cases involving a "class of one" claim which is relevant to constitutionality and enforcement of the city ordinance in question. See, *Village of Willowbrook v. Olech,* 528 U.S. 562, 145 L.Ed.2d 1060, 120 S. Ct. 1073 (2000); and also *McDonald's Corp. v. City of Norton Shores,* 102 F. Supp.2d 431 (2000). Mr. Rowe showed that the government treated him differently than others similarly situated and that there was no rational basis for the difference. As such, this "class of one" claim deserves to be heard upon its merits.

The Sixth Circuit has reviewed other cases wherein a citizen has alleged that city ordinances were unconstitutional. In *Berger v. City of Mayfield Heights*, 154 F.3d 621 (C.A.6 (Ohio) 1998), the court found a similar grass-mowing ordinance to be unconstitutional. That ordinance was

unconstitutional on its face only as to Mr. Berger. The ordinance in question here is alleged to be unconstitutional on its face and as applied to Mr. Rowe (R. 1, Complaint, Paragraphs 10 (d)-(g), 26 & 35); (R. 27, Exhibits by Defendants, Rowe Dep. TR pages 62-88 & 109-134) and (R. 27, Exhibits by Defendants, Exhibit A, Answers to Interrogatories Nos. 5,6,18 & 22). See, *McDonald's Corp. v. City of Norton Shores,* 102 F. Supp.2d 431 (W.D.S.D (Mich.) 2000); and *Simi Investment Co. Inc. v. Harris County,* 236 F. 3d 240 (C.A. 5 (Tex.) 2000).

The city in this case has always claimed that the ordinances in question were rationally related to legitimate concerns. Such acts and the ostensible label of "legitimate concerns" used by city officials in support of their actions can be mere euphemisms for harassment and discrimination. Such harassment and discrimination can be done against a group or an individual, no matter what their race, creed or color, if it is wrapped in the flag of "legitimate concerns". As stated in *City of Memphis v. Greene*, 451 U.S. 100, (1981), " Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination." Id at page 795. See also, *Bannum, Inc v. City of Louisville, Ky.*, 958 F.2d 1354 (C.A.6 (Ky.) 1992); *Richardson v. Township of Brady*, 218 F.2d 508 (C.A.6 (Ohio) 2000).

The manner in which this ordinance was <u>enforced</u> is unconstitutional because it was done in an arbitrary and unreasonable manner. The manner in which it was <u>enforced</u> in this case was by having an employee of the city drive by the offending parcel of land and glance at the height of the grass and decide from this drive-by that it exceeded 12 inches and had to be cut (R. 30, Response, Exhibit 15, TR of Finance Committee meetings, page 1). <u>Enforcement</u> of an ordinance in this manner cannot pass constitutional muster.

This manner of enforcement allows room for error in whether or not there is a violation and whose alleged grass needs to be cut. The Defendants herein are not alleged to be liable in enacting such legislation, as misstated by the lower courts (R. 32, Order, page 6), but rather in enforcing it in such a manner.

The issue of the constitutionality of the city ordinances was ignored or glossed over by the lower courts as unimportant. As stated by Chief Judge Merritt in his dissenting opinion in *Richardson v. City of South Euclid*, 904 F.2d 1050 (C.A.6 (Ohio) 1990), "a vague law allows law enforcement officials to pick and choose whom they will arrest and who will go free. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id at page 1056. See also, *Van Hull v. Marriott Courtyard*, 87 F. Supp.2d 771 (2000); *Local No. 1903 v. Bear Archery*, 617 F.2d 157 (C.A.6 (Mich.) 1980); *Colson v. Shaker Heights*, 880 F. Supp. 1161 (N.D. Ohio 1995); and *Holloway v. Brush*, 220 F.3d 767 (C.A.6 (Ohio) 2000).

III. The Decision Of The Sixth Circuit Adversely Impacts Members Of A Protected Class And Eliminates The Rights Of All Persons Under The 13th Amendment.

The alleged violation of 13th Amendment rights has been discussed by the appellate court in *U.S. v. Brown*, 49 F.3d 1162 (C.A.6 (Ohio) 1995). "In passing the Civil Rights Act of 1866, Congress assumed it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." Id at

page 1166. Other courts in this Circuit have looked at alleged 13th Amendment violations with an eye towards an all-encompassing right of all persons to be free from involuntary servitude. In *Tyus v. Ohio Dept. of Youth Services*, 606 F. Supp. 239 (S.D. Ohio, 1985) the court therein stated that "Despite the fact that the Thirteenth and Fourteenth Amendments were passed originally to secure the rights of a specific group, and that a particular group may have been the original beneficiary of the Amendments, it is now beyond doubt that they are applicable to all citizens." Id at page 246. See also, *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969).

The trial court dismissed as inapplicable the cases cited by Plaintiff (R. 32, Order, page 21). However, the case of *Callaghan v. Dep't of Fire*, 385 So.2d 25 (C.A.4 Cir., 1980) is very applicable. The standard enunciated by the court therein is true and relevant to the case at bar. "Forcing a man to work against his will without pay is involuntary servitude." Id at page 28. The difference is Mr. Callaghan was being forced to work, at his job, while mowing grass on city-owned property is not Mr. Rowe's job. The difference between the cases makes Mr. Rowe's claim more accurate and likely to succeed on 13th Amendment grounds; not less likely to succeed. *See*, *Buchanan v. City of Bolivar*, 99 F. 3d 1352 (C.A.6 (Tenn.) 1996); *Scott v. Stout*, 248 F. 3d 1151 (C.A.6 (Tenn.) 2001); *Jackson v. City of Columbus*, 67 F. Supp. 2d 839 (S.D. E.D., (Ohio) 1998); *Cuevas v. Hardy*, 2000 U.S. Dist. LEXIS 1632 (W.D. S.D., Mich.).

The lower court stated that Mr. Rowe did not produce any evidence of racially discriminatory motivations on the part of the city (R. 32, Order, page 21). An alleged violation of the 13th Amendment does not have to show a racially discriminatory motive, such a claim must show that the

actions of the defendant placed the plaintiff in a position of being "fairly characterized as a badge or incident of slavery." as stated in *Greene* on page 126. The other cases cited do not refer to the need to show a racially discriminatory motive and none should be required of Mr. Rowe or any person claiming a violation under this Amendment. See also, *Melson v. Kroger Co.*, 550 F. Supp. 1100 (S.D. Ohio 1982).

CONCLUSION

For the reasons set forth above, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 6, 2002]

No. 01-3005

HARLEY E. ROWE,
Plaintiff-Appellant,

v.

CITY OF ELYRIA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
99-01555. Oliver, Jr. 12-04-00

JUDGES:
Before: GUY and BATCHELDER, Circuit Judges; WALTER, District Judge.*

* The Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

OPINION

PER CURIAM. Plaintiff, Harley E. Rowe, appeals from the entry of judgment in favor of the defendants the City of Elyria, Ohio; the City Council; Gerald Klein, the Building Director; and Craig Sampson, an employee in the City's Safety Service Department. Plaintiff relies on various incidents of alleged harassment through the City's use of ordinances and regulatory power as the basis for various claims under 42 U.S.C. § 1983. The district court dismissed the City Council because it is not an entity capable of being sued under Ohio law. The court also found that even assuming that the individual council members were being sued, they were entitled to absolute immunity for their legislative activities. The district court granted summary judgment to the defendants on the remaining claims. Finally, the district court also found that claims arising prior to June 29, 1997, were barred by the applicable two-year statute of limitations.

Plaintiff argues on appeal that the district court erred in granting summary judgment to defendants with respect to (1) his claims of selective enforcement; (2) his constitutional challenge to the City's "mowing" ordinance; (3) his claim of involuntary servitude; and (4) his claim that the City's employees acted pursuant to municipal custom or policy in violating his constitutional rights. After a review of the record and the arguments presented on appeal, we affirm.

I.

Plaintiff is the owner of the West River Marathon service station located at 803 West River Road in Elyria, Ohio, as well as a second building located across the street at 800 West River Road. The complaint alleged that the City

harassed and selectively enforced its ordinances against plaintiff in violation of 42 U.S.C. § 1983 (counts 1 & 2). The various incidents of harassment are not alleged in chronological order. Plaintiff complains first that he was assessed a $25 charge for each of two false security alarms in January 1997. Plaintiff disputed whether the alarms were in fact "false," but eventually paid the charges.

In January 1999, plaintiff was required to get a demolition permit for the removal of a canopy that stood over the gas pumps when it partially collapsed under the weight of several feet of snow. Plaintiff got a contractor to remove the canopy that day, but did not get a demolition permit. Conceding that he would have gotten a permit if he was aware that one was required, plaintiff nonetheless argues that enforcing the permit requirement after the fact was just harassment.

Plaintiff also complains that the City cited the property at 800 West River Road for property maintenance code violations when the City knew the building would be demolished. Plaintiff purchased the property on January 28, 1998, and admitted that it looked "kind of rough," had peeling paint, and had holes in the parking lot. In November 1998, plaintiff was served with courtesy notice of violations requiring repairs to the parking lot, repainting and removal of graffiti, and repairs to the foundation walls. The City proceeded against the former owner first, then issued a notice of violations against plaintiff in January 1999. Plaintiff was not fined for the violations, the property was renovated, and an ice cream parlor was ultimately opened on the site.

In December 1994, plaintiff received notice concerning violations of the City's signage ordinance. Specifically, plaintiff was contacted about portable signs

placed in the "tree lawn" in front of his service station and cigarette advertising signs attached to the fence along the side of the property. Plaintiff voluntarily removed the portable signs, but denied that either the fence or the advertising signs belonged to him. Following correspondence from plaintiff's attorney, the City determined that the fence was City property and removed the signs itself. Although enforcement was threatened, no action was taken.

Plaintiff complains about the City's policy of charging about $70 per year to inspect the gas pumps at his service station. First, plaintiff argues that the inspections prior to 1994 were conducted in the absence of a municipal ordinance on the subject. Second, plaintiff complains that even after there was an ordinance, the City charged for the same inspections that the county did for free. Plaintiff admitted, however, that the City had an interest in regulating the gasoline service stations within its jurisdiction.

Next, plaintiff claims his business was damaged by the closing of West River Road and rerouting of traffic during sewer construction projects and "other activities." In July 1998, the City closed West River Road to through traffic for sewer work adjacent to the roadway. The station was located on the corner of West River Road and Furnace Road. Furnace Road remained open, leaving access to the station from that direction. Plaintiff believed that the road work could have been done without closing the road and claims lost revenue of $55,000. The closure for "other activities," which is not discussed on appeal, pertains to the City's closing of the street in 1996, 1997, and 1998, from 6:00 p.m. to midnight for the Fourth of July fireworks festivities at the park adjacent to plaintiff's property.

Finally, plaintiff raises several claims relating to the City's mowing ordinance, which requires the owner or occupant of property to ensure that grass and weeds do not exceed a height of twelve inches. The ordinance, adopted in 1996, provides as follows:

> 553.02 REMOVAL OF WEEDS BY OWNERS OR OCCUPANT; FIVE DAYS NOTICE
>
> It is hereby determined that weeds, vetch, grasses, vines, or any other ground cover growing to a height of twelve (12) inches or more is a nuisance. No person, whether owner or occupant, having the charge or management of any lot or parcel of real property situated within the City of Elyria, whether said real property is improved, unimproved, vacant or occupied, shall allow or permit weeds, vetch, grasses, vines, or any other ground cover to grow a height of twelve (12) inches or more.

Notice is provided by publication each year, after which the Director of Safety Services may send notice of a violation giving the owner/occupier five days to remedy the situation on his own. If it is not corrected within five days, the City may mow up to a depth of 100 feet at a fee of $200 per hour with a one hour minimum charge.

On September 29, 1998, plaintiff was sent a notice that the grass or weeds at 800 West River Road exceeded twelve inches, and that the City would mow it at a cost of $200 per hour if he did not mow it himself within five days. Plaintiff admitted that he was aware of the ordinance and its application to his property, had no idea whether the grass or

weeds at the property violated the ordinance, and did not personally inspect the property. Although plaintiff made arrangements to have the property mowed, it was not completed within five days. The City mowed on October 13 and charged plaintiff $200, which was later reduced to $100 by the City Council Finance Committee. Plaintiff claims that the City's action was taken without sufficient proof of a violation of the ordinance, that the City actually owned the "tree lawn" that was mowed, and that making him mow it subjected him to involuntary servitude.

Plaintiff filed this action in June 1999, alleging selective enforcement in violation of 42 U.S.C. § 1983 (counts 1 & 2); involuntary servitude (count 3); conspiracy to deprive him of his rights (count 4); "waste" by forcing unnecessary cosmetic improvements to the property at 800 West River Road (count 5); unconstitutional taking of property in violation of due process (count 6); declaration that the mowing ordinance is unconstitutional (count 7); and seeking an injunction against harassment by City officials (count 8). Plaintiff requested $2 million in compensatory damages. Defendants filed a motion to dismiss and for summary judgment, which was opposed by plaintiff. On November 30, 2000, the district court issued its opinion and order, which dismissed the City Council and its members and granted summary judgment to the remaining defendants. This appeal followed.

II.

We review the district court's decision to grant summary judgment *de novo*. *Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the

moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The nonmoving party, however, may not rest on his pleadings, but must come forward with evidence from which a rational trier of fact could find in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We address in turn the plaintiff's specific claims of error.

A. Selective Enforcement

Plaintiff argues that there were factual disputes concerning his claims of selective enforcement. "Sometimes the enforcement of an otherwise valid law can be a means of violating constitutional rights by invidious discrimination. To address this problem, courts have developed the doctrine of selective enforcement.'" *Gardenhire v. Schubert,* 205 F.3d 303, 318 (6th Cir. 2000) (quoting *Futernick v. Sumpter Township,* 78 F.3d 1051, 1056 (6th Cir. 1996)). To prevail on a claim of selective enforcement, a plaintiff must establish three elements:

> First, [an official] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, [the official] must initiate the prosecution with a discriminatory purpose. Finally, the

> prosecution must have a discriminatory effect on the group which the defendant belongs to.

Id. at 319 (quoting *United States v. Anderson,* 923 F.2d 450, 453 (6th Cir. 1991)). The first element requires '"that the plaintiff make at least a *prima facie* showing that similarly situated persons outside her category were not prosecuted.'" *Id.* (quoting *Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir. 1997)). Further, we have recognized a strong presumption that the official has properly discharged his duties, and only clear evidence to the contrary will overcome it. *Id.*

In this case, the district court found that plaintiff had not alleged in either the complaint or in response to defendants' motion that he belonged to any identifiable group which has been prosecuted while other similarly situated persons were not prosecuted. As a result, the court concluded that plaintiff failed to make a *prima facie* showing of selective enforcement. Plaintiff argues on appeal that he provided a list of witnesses in his answers to interrogatories that included persons who he believes were not prosecuted under the grass mowing ordinance. Emphasizing that the City chose not to depose these witnesses, plaintiff fails to recognize that it is his burden to come forward with evidence to support his claim of selective enforcement. Providing a witness list in discovery does not suffice. The district court properly granted summary judgment on the selective enforcement claim.

B. Mowing Ordinance

Plaintiff argues that the district court erred by failing to separately discuss his claim that the mowing ordinance was unconstitutional on its face and as applied. In response to defendants' motion, plaintiff asked that the court declare the

ordinance unconstitutional because (1) he was forced to mow property owned by the City; (2) the City issued the notice of violation without knowing who owned the property; and (3) the drive-by inspection of properties for compliance with the ordinance violated due process. Since the selective enforcement and involuntary servitude claims are addressed elsewhere, only plaintiff's substantive due process claim remains.

Plaintiff argues that the City's mowing ordinance is similar to the ordinance that was found to be unconstitutional in *Berger v. City of Mayfield Heights,* 154 F.3d 621 (6th Cir. 1998). Review of the opinion in *Berger* makes clear that the ordinances are not alike in any material way. For both substantive due process and equal protection challenges to an ordinance, the question is whether a rational relationship exists between the terms of the ordinance and a legitimate governmental purpose. *Id.* at 624.

Without recounting the details of the ordinance at issue in *Berger,* it was critical to the court's decision that an existing mowing ordinance (like the one here) was amended at the behest of the plaintiff's neighbor to require total clear cutting of vacant property to no more than eight inches in height; but only if the property had less than 100 feet of street frontage and a total area of less than one acre. This court found no rational relationship between the clear-cutting requirement and the asserted purpose of discouraging vermin and avoiding damage from falling tree limbs. Even if the ordinance was interpreted as only applying to weeds and debris, which the court indicated would likely avoid the substantive due process problem of the provision not being rationally related to any legitimate health or safety concern, it would still be unconstitutional because its application to an

arbitrarily selected segment of the city's vacant lots violated the Equal Protection Clause. *Id.* at 625.

Significantly, the court took care to emphasize that its holding did not invalidate all mowing ordinances.

> Needless to say, this holding does not prohibit properly drawn ordinances from regulating the maintenance of vacant lots when the enactment avoids the arbitrary and capricious terms of the one in question. In fact, we doubt that anyone would contend that [the general mowing provision] alone lacked a rational basis if it uniformly applied to all vacant lots within the City. Rather, it is the arbitrary and capricious burden placed on the owners of the vacant lots covered by [the clear cutting provision] as opposed to "all other unimproved or vacant lots" covered by [the general provision] that is the primary cause of the constitutional infirmity in the case before us.

Id. at 626. In this case, plaintiff makes no effort to articulate how Elyria's ordinance, which applies to vacant, occupied, improved, and unimproved properties alike, is not rationally related to a legitimate governmental purpose. Further, we are not persuaded that the fact that the ordinance may have been applied to the tree lawn area of the property, which may or may not have belonged to the City, affects the rational relationship between the ordinance and the City's legitimate governmental purposes relating to aesthetics and vermin control.

Plaintiff argues next that even if the ordinance is rationally related to a legitimate governmental concern, it is unconstitutional as applied because enforcement was undertaken in an arbitrary and unreasonable manner. Specifically, plaintiff challenges the practice of having the enforcement officer drive by the parcel and decide whether the height of the grass exceeded twelve inches and had to be cut. This manner of enforcement, plaintiff claims, allows room for error. Plaintiff offers no authority to support his conclusion that it is constitutionally unreasonable to determine compliance in this manner. We find that it is not.

C. Involuntary Servitude

Plaintiff challenges the dismissal of his claim that enforcement of the mowing ordinance subjected him to involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. Plaintiff claims that forcing him to mow the grass in the tree lawn or pay a fine may be fairly characterized as a "badge or incident of slavery." *See City of Memphis v. Greene,* 451 U.S. 100, 124-26, 67 L. Ed. 2d 769, 101 S. Ct. 1584 (1981) (impact of closing street is routine burden of citizenship, not a violation of the Thirteenth Amendment). Plaintiff continues to rely on *Callaghan v. Department of Fire,* 385 So.2d 25 (La. App. 1980), in which the court found that imposing discipline in the form of ordering a firefighter to work 24 hours without pay as a condition of reinstatement constituted involuntary servitude. We agree with the district court that *Callaghan* is not analogous to this case.

Further, *Callaghan* is not particularly persuasive in light of the subsequent decision in *United States v. Kozminski,* 487 U.S. 931, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988), in which the Court addressed the meaning of the term

"involuntary servitude" under the Thirteenth Amendment and 18 U.S.C. § 1584. The Amendment was not limited to the abolishment of African slavery, but "the phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'" *Id.* at 942 (citation omitted).

Rejecting a broad construction of the phrase, the Court in *Kozminski* held that "only situations involving the compulsion of services 'by the use or threatened use of physical restraint or injury, or by the use of threat of coercion through law or the legal process' constitute 'involuntary servitude' prohibited by § 1584 and the Thirteenth Amendment." *Buchanan v. City of Bolivar,* 99 F.3d 1352, 1357 (6th Cir. 1996) *(quoting Kozminski,* 487 U.S. at 948, 952). The Court in *Kozminski* offered the following insight:

> Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms the Amendment excludes involuntary servitude imposed as legal punishment for a crime. Similarly, the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties [*e.g.*, jury service, military service, and roadwork].

487 U.S. at 943-44. While we have not located any cases discussing the imposition of charges for failing to maintain property, we conclude that even if the tree lawn is owned by

the City enforcement of the mowing ordinance does not involve the kind of compulsion that would constitute involuntary servitude under the Thirteenth Amendment.

D. Custom and Policy

To establish municipal liability under § 1983, plaintiff must demonstrate that the City itself caused the constitutional deprivation. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Plaintiff argues that the long list of incidents of selective enforcement of various ordinances' constitutes a custom or policy. Having found that plaintiff was unable to demonstrate the alleged constitutional violations, the City cannot be held liable under § 1983 for the actions of its employees. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). Finally, since plaintiff has not shown that the mowing ordinance is unconstitutional or subjected him to involuntary servitude, we need not determine whether the City Council acted as a "final policymaker" by enforcing the ordinance against plaintiff.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed November 30, 2000]

No. 1:99 CV 1555

HARLEY E. ROWE, Plaintiff,	)
v.	)
CITY OF ELYRIA, *et al.*, Defendants.	)

Judge Solomon Oliver, Jr.

ORDER

Currently pending before the court are Defendants' Motion to Dismiss "Elyria City Council" (Doc. No. 20), and Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. No. 26). For the reasons set forth below, both motions are granted, and the instant case is hereby dismissed.

I. FACTS

Plaintiff Harley E. Rowe ("Rowe") is the owner of West River Marathon, located at 803 West River Road, and of related property located across the street at 800 West River Road, in Elyria, Ohio. On December 15, 1999, Rowe filed the instant action against the City of Elyria (the "City"), Elyria City Council (the "Council"), Gerald Klein ("Klein"), the City Building Director and Craig Sampson ("Sampson") of the Elyria Safety Service Department, claiming violations of his civil rights pursuant to 42 U.S.C. § 1983. Rowe included in his Complaint claims for violation of his civil rights (claims #1 and 2), involuntary servitude (claim #3), conspiracy (claim #4), waste (claim #5), unconstitutional taking of property (claim #6), along with requests for declaratory judgment (claim #7) and injunctive relief (claim #8).

Rowe's Complaint consists of a laundry list of grievances against the City of Elyria and its City Council, which Rowe argues amount to discrimination and harassment by the Defendants. Among other things, Rowe alleges that the City charged him for police response to false burglar alarms, that the City required a permit for tearing down a canopy which had fallen due to an act of God, that the City required unnecessary cosmetic changes to a building which it knew would ultimately be torn down, that the City assessed charges for signs posted on property owned by the City, that the City assessed charges for gas pump inspection, and that the City closed streets adjacent to Rowe's property, during construction and community activities, causing damage to Rowe's business.

Chief among Rowe's complaints is the assessment of charges for the mowing of his tree lawn. On February 26,

1996, the Council enacted Ordinance Number 96-41, permitting the assessment of fines on Elyria property owners who fail to remove from their property weeds, grasses and vines that have grown over twelve inches high. Plaintiff alleges the ordinance is selectively enforced against him by the Defendants in efforts to continuously harass him, with the intention of impairing his business's ability to thrive. Specifically, Rowe alleges that the ordinance requires him to mow his tree lawn, a section of land attached to his 803 West River Road property, which is actually owned by the City of Elyria. Despite his complaints, Rowe alleges that he has been forced to comply with the ordinance in order to avoid further penalty.

Defendants have moved for dismissal of Rowe's claims as against the Elyria City Council and its individual members, arguing that the Council is not an entity capable of being sued, and that the individual members are absolutely immune from suits arising out of their legislative functions. Defendants have also moved for dismissal or summary judgment of Rowe's claims as against the City, Klein and Sampson on separate grounds.

II. MOTION FOR DISMISSAL OF DEFENDANT ELYRIA CITY COUNCIL

A. Dismissal Standard

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King and Spalding,* 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)); *see also, Bower v. FederalExpress Corp.,* 96 F.3d 200, 203 (6th Cir. 1996). In ruling on a motion to dismiss for failure to

state a claim, "[t]he complaint must be construed in the light most favorable to the plaintiff and its well-pleaded facts must be accepted as true." *Scheur v. Rhodes,* 416 U.S. 232, 236 (1974).

B. Law and Analysis

1. Plaintiff's Claims against the Council

Rowe concedes that his claims against the Council revolve entirely around the assessment of mowing charges pursuant to Ordinance Number 96-41. Deposition of Harley Rowe (hereinafter "Rowe Dep.") at 79. Rowe asserts that the Council enacted this allegedly unconstitutional and unreasonable ordinance and has fined him for violating it. In support of its motion to dismiss, the Council argues that it is not *sui juris,* or an entity capable of suing or being sued.

In accordance with Federal Rule of Civil Procedure 17(b), the capacity of a governmental entity to sue or be sued in the federal courts is determined by the law of the state in which the district court sits.** Under Ohio law, absent statutory authority, a city council cannot sue or be sued. *See e.g., City of Cuyahoga Falls v. Robart,* 567 N.E.2d 987, 992 (Ohio 1991) (citing *State ex. tel. Cleveland Municipal Court v. Cleveland City Council,* 296 N.E.2d 544, 547 (Ohio 1973)). The Supreme Court of Ohio has consistently held that

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** Fed. R. Civ. P. 17(b) specifically sets forth the rules regarding the capacity to sue or be sued for individuals and for corporations. "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held."

any claim an individual has against a city council should be brought against the city or existing councilmen. *Id.*

The court is not aware of any statutory authority and no authority has been brought to the court's attention supporting an action against the Council in this context. Since the Council is not an entity capable of being sued for purposes of the case at bar, Rowe may not assert claims against it. Accordingly, Defendants' motion to dismiss Plaintiff's claims against the Council is hereby granted.

2. Plaintiff's Claims Against the Individual Members of the Council

As a preliminary matter, Defendants assert that Plaintiff has not taken the steps necessary to assert any claims against the Council members individually. They claim that Rowe's Complaint never identified the individual Council members by name and only stated "Defendant, Elyria City Council, is the governing body of [the] municipality, both individually and in their [sic] official capacity." Amend. Complaint ¶ 5. Defendants also note that none of the individual Council members were served with process. Plaintiff maintains that even if his Complaint does not clearly state that the Council members are being sued in their individual as well as official capacity, his claims should not be dismissed because the Council and its members were given sufficient notice of the individual claims pending against them.

Generally, the court assumes a government official is being sued in his or her official capacity unless otherwise indicated. *Wells v. Brown,* 891 F.2d 591,593 (6th Cir. 1989). However, even where a complaint is unclear regarding the capacity in which a defendant is being sued, the Sixth Circuit

has sometimes found that notification through subsequent pleadings or correspondence is sufficient to put a defendant on notice he is being sued in his individual capacity. For example, in *Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir. 1995), the court found that the defendants, correctional officers, were put on notice that they were being sued in their individual capacities when defendant indicated in a motion that "defendants acted outside of the scope of their employment and in bad faith when they cut his hair." Likewise, in *Abdur-Rahman v. Michigan Department of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995), the court found that plaintiff had given sufficient notice by indicating in his reply to defendant's summary judgment motion that he sought to sue defendant in both his official and individual capacities.

This court need not determine whether Rowe clearly alleged that the Council members were being sued in their individual capacities. Assuming that they were for purposes of the motions before the court, Council members are absolutely immune from suit regarding claims arising out of their legislative acts.

The Supreme Court has long recognized that absolute immunity in § 1983 actions "attaches to all actions taken 'in the sphere of legitimate legislative activity'." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998), absolute immunity was extended to local legislators for their legislative activities. The Court made clear that the determination of whether an activity is legislative must be made without regard to the legislator's subjective intent and "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* Indeed in *Bogan*, the court refused to consider the argument that the motivation for the legislative elimination of plaintiff's position was racial animus and retaliation for the exercise of

her first amendment rights. *Id.* Thus, the question becomes "whether, stripped of all considerations of intent and motive, [the] actions were legislative." *Id.* at 55. The Supreme Court specifically acknowledged that an activity such as voting for an ordinance is "quintessentially legislative" and "[bears] all the hallmarks of traditional legislation." *Id.*

In this case, Rowe contends that the Council members' enactment of the ordinance was administrative or quasi-judicial in nature because their actions were done "in a conspiracy of harassment and not as part of their legislative functions." Resp. to Defendants' Mot. to Dismiss at 2. However, to the extent that Plaintiff seeks to sue members of Council for passing acts of legislation, regardless of their motivation, his Complaint is dismissed on the ground of qualified immunity, *Bogan* clearly dictates this result.

This immunity would extend to any and all claims against the members of Council involving the passage of Ordinance No. 96-41 of the City of Elyria, which prohibits owner or occupant from allowing grass, weeds, or other vegetation to grow more than 12 inches and providing that the Director of Safety Service may cut such grass, weeds or vegetables and assess a fee therefor, if the person, owner or occupant does not timely cut it after appropriate notice. As mentioned above, it does not matter what Council's motivation was in enacting the statute. Pursuant to the dictates of Bogan, the claims against the Council member are dismissed on the ground of qualified immunity.

III. MOTION FOR SUMMARY JUDGMENT AS TO REMAINING DEFENDANTS

A. Summary Judgment Standard

Defendants have filed a motion to dismiss and for summary judgment. Because Defendants' motion requires the court to consider materials outside the pleadings, the court considers Defendants' motion under the summary judgment standard. Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ....

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein .... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse

> party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary' judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986).

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970); *White v. Turfway Park Racing Ass'n, Inc.,* 909 F.2d 941,943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S.Ct. at 2512.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552. Moreover, "the

trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d *1029*, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

B. Law and Analysis

1. First Claim for Relief (Civil Rights)

Rowe's first claim for relief contains a list of various actions by the City which he claims were meant to harass, annoy, vex and bother him, and have substantially impaired his ability to function and thrive as a business. Complaint at ¶¶8, 9, 10. He maintains that these alleged actions constitute a violation of his civil rights pursuant to 42 U.S.C. § 1983. Specifically, the undisputed facts regarding Plaintiff's claims are as follows:

(a) Assessing Plaintiff for false alarm charges

Plaintiff maintains that Defendants have engaged in "harassment" by "assessing Plaintiff for false alarm charges." *See* Plaintiff's Complaint, ¶ 10(a). This allegation arises from the City's enforcement of its Ordinance No. 703.20, which imposes a $25 fee for false alarms. (Deposition of Harley Rowe, p. 19, Elyria Ordinance No. 703.20 marked as Defendants' Exhibit "B.") Specifically, the ordinance defines

"false alarm" as "an alarm for which there is not reasonable cause to believe that the cause of the activation was an emergency for which the alarm system was designed." (Deposition of Rowe, Elyria Ordinance No. 703.20 marked as Defendants' Exhibit "B.")

Plaintiff had earlier litigated the application of Ordinance No. 703.20 to his business, West River Marathon at 803 West River Road in Elyria. (Deposition of Rowe, p. 19-20, Elyria Municipal Court Report marked as Defendants' Exhibit "C.") Though the Elyria Municipal Court found the particular alarm charges invalid because the City failed to prove the alarms were "false," the Court did not hold Ordinance No. 703.20 unconstitutional. (Deposition of Rowe, Elyria Municipal Court Report marked as Defendants' Exhibit "C.")

Plaintiff's present claim concerns the City's imposition of false alarm charges since 1997. In early 1997, Elyria Police responded to three false alarms at Plaintiffs West River Marathon. (Deposition of Rowe, p. 23, Elyria Police Dept. Alarm Report Record marked as Defendants' Exhibit "D.") Thereafter, the City charged Plaintiff for the second and third, but not the first, false alarm pursuant to Ordinance No. 703.20. Plaintiff eventually paid those charges totaling $50. (Deposition of Rowe, p. 25; Elyria Police Dept. A1 Report Record, Defendants' Exhibit "D.")

(b) Requiring a building permit for removing a canopy that had fallen sue to an act of God.

Plaintiff also alleges that Defendants have engaged in"harassment" by "requiring a building permit for removing a canopy that had fallen due to an act of God." Plaintiff's Complaint, ¶10(b). This claim arose out of events occurring

on January 16, 1999, when the canopy over the gasoline pumps at West River Marathon began collapsing under the weight of several feet of snow. (Deposition of Rowe, p. 35.) When Plaintiff arrived at the station that morning, the canopy was visibly sagging about 12 inches below its typical height. (Deposition of Rowe, p. 36.) Plaintiff immediately arranged for a construction company to remove the canopy that day. (Deposition of Rowe, p. 35-36; *Plain Dealer* article 1-17-99 marked as Defendants' Exhibit "E.")

The City later required Plaintiff to obtain a demolition permit for removing the canopy. (Deposition of Rowe, p. '39.) Plaintiff admitted that if he knew a permit was required at the time on January 16, 1999, he would have requested and purchased it. (Deposition of Rowe, p. 40.) Plaintiff also admitted that if the canopy had collapsed completely, he would understand the necessity of obtaining a demolition permit to have it removed from the property. (Deposition of Rowe, p. 41 .) Plaintiff further admitted that he was unaware of any similar situation of a canopy collapsing in the City of Elyria and that he is not claiming selective enforcement based on a prohibited classification. (Deposition of Rowe, p. 41.) Rather, Plaintiff's sole complaint is that the City's requiting a demolition permit after the fact was "further harassment." (Deposition of Rowe, p. 42.)

(c) Requiting unnecessary cosmetic changes to a building knowing that it would be torn down and assessing Plaintiff for failing to perform these changes

Plaintiff further alleges that Defendants have engaged in "harassment" by "requiting unnecessary cosmetic changes to a building knowing that it would be torn down and assessing Plaintiff for failing to perform these changes."

Plaintiff's Complaint, ¶10(c). This allegation concerns Plaintiffs property at 800 West River Road, Elyria. (Deposition of Rowe, p. 46.) Plaintiff purchased this property in January, 1998. Plaintiff admits the property "looked kind of rough, peeling paint, parking lot was not in [sic] real good shape." (Deposition of Rowe, p. 46.) There are also photographs which showed the poor condition of the property. (Deposition of Rowe, p. 51; photographs of 800 West River Road, taken 6-22-98 marked as Defendants Exhibit "F.")

In November, 1998, the City served Plaintiff with a Notice of Violations and Correction Order which required Plaintiff to repair holds in the parking lot, repaint and remove graffiti from the building, and repair foundation walls. (Deposition of Rowe, p. 57, Notice of Violations and Correction Order marked as Defendants' Exhibit "G.") Plaintiff discusses these changes as "cosmetic changes" which Plaintiff deemed to be "harassment." (Deposition of Rowe, p. 52.) Although Plaintiff did not correct the violations within 60 days as required by the Notice, the City did not fine him. (Deposition of Rowe, p. 58-59.) Contrary to Plaintiffs allegation in his Complaint, ¶10(c), the building on the property was never torn down, rather, it was renovated. (Deposition of Rowe, p. 59.) Eventually, Plaintiff renovated the property and corrected the violations to build an ice cream parlor on the site. (Deposition of Rowe, p. 46, 52.)

In essence, Plaintiff contests the City's attempt to compel property improvements and renovations that Plaintiff needed to do anyway in light of his plans for the building. Although the City never actually fined Plaintiff or took him into court for the building code violations, Plaintiff's Complaint maintains the City threatened to do so. (Deposition of Rowe, p. 60.)

(d) Assessing mowing charges against Plaintiff

Plaintiff also alleges that Defendants engaged in "harassment" against him by charging him with violation of the City's "mowing ordinance" as follows:

- Assessing mowing charges against Plaintiff on land that is owned by the City;

- Assessing mowing charges against Plaintiff without proper validation or proof of violation of the ordinance;

- Assessing mowing charges against Plaintiff which are higher than the amount authorized for a minor misdemeanor offense;

- Assessing mowing charges against Plaintiff without due process of law and on parcels of land that were not identified correctly by Defendants.

Plaintiff's Complaint, ¶¶ll0(d), (e), (f), (g).

Plaintiff's claim arises from the City's enforcement of its Ordinance No. 553.02, which requires the owner or occupant of property to ensure that grass and weeds do not exceed a height of twelve inches. (Deposition of Rowe, p. 62; Elyria Ordinance No. 553.02 marked as Defendants' Exhibit "I."). The ordinance applies to both owners and occupiers of real property within the City, and it applies regardless of whether the property is vacant or occupied, improved or unimproved. (Deposition of Rowe, p. 62-63.)

Pursuant to this ordinance, the City sent Plaintiff a Notice of Violation on September 29, 1998. (Deposition of

Rowe, p. 63, Notice of Violation marked as Defendants' Exhibit "J.") The notice informed Plaintiff that the City had received a complaint that grass or weeds on the 800 West River Road property exceeded twelve inches in height. (Deposition of Rowe, p. 63.) Additionally, the notice informed Plaintiff if he did not mow the grass and weeds within five days, the City would mow the property at a rate of $200 hourly at Plaintiff's cost. (Deposition of Rowe, p. 63-64).

Previously, the City had provided property owners in Elyria with notice of Ordinance No. 553.02 through publication in local newspapers on April 1 and April 15, 1998. (Deposition of Rowe, p. 63, Defendants' Exhibit "J.") Plaintiff admitted that he was generally aware of the application and effect of this ordinance concerning his property. (Deposition of Rowe, p. 64.) Plaintiff further admitted that he had no idea whether the grass and weeds on his property at 800 West River Road exceeded twelve inches in height. Even after receiving the Notice of Violation, Plaintiff did not personally inspect the property. (Deposition of Rowe, p. 65-66.)

Plaintiff did not object to the Notice of Violation itself or to the application of Ordinance No. 553.02 generally. Upon receipt of the Notice of Violation, Plaintiff made some telephone calls to arrange for his property at 800 West River Road to be mowed. (Deposition of Rowe, p. 65.) However, Plaintiff later objected when the City mowed the property after he had not done so within the prescribed period and sent Plaintiff a bill for $200. (Deposition of Rowe, p. 68, Bill marked as Defendants' Exhibit "K".)

Plaintiff's primary objection is that application of Ordinance No. 553.02 subjects him to "involuntary.

servitude." (Deposition of Rowe, p. 69-72.) Plaintiff claims that the City of Elyria is the record owner of the property in question that was mowed, although he has not produced any documents substantiating his claim. (Deposition of Rowe, p. 70-71 .) Plaintiff further claims that the City assessed the mowing charge without proof of a violation of Ordinance No. 553.02, even though Plaintiff himself has no personal knowledge of the condition of grass and weeds on the property or of the actual area of the property that was mowed by the City. (Deposition of Rowe, p. 65-66.)

Plaintiff presented his objections to the Elyria City Council Finance Committee, which reduced the charge to $100. Still, Plaintiff never paid the charge. (Deposition of Rowe, p. 73-74.)

In addition to the foregoing allegations, Plaintiff believes that the City should compensate him in the amount of $88,000 for the labor he has expended mowing the lawn on the property for the past fourteen years. (Deposition of Rowe, p. 87-88.)

(e) Assessing Plaintiff for signs posted on fences adjacent to property owned by Plaintiff and on property owned by the City; threatening to take signs down from the tree lawn and impound them without due process of law and ordering employees of Plaintiff to remove them

Plaintiff further alleges that the City improperly cited Plaintiff for posting signs and threatened to remove them. Plaintiffs Complaint, ¶10(h), (i). This claim arises from the City's enforcement of Elyria Ordinance No. 1393.13, which prohibits signs placed "upon any public sidewalk, public

street, parkway or tree lawn in the City." (Deposition of Rowe, p. 91, Ordinance No. 1393.13 marked as Defendants' Exhibit "L.") On December 7, 1994, Plaintiff received from Gerald Klein, Elyria Building Director, a Notice of Violation of Ordinance No. 1393.13 for portable signs on. the tree lawn and on the fence at Plaintiffs Marathon station. (Defendants' Exhibit "L.")

Plaintiff voluntarily removed the offending signs upon receipt of the City's notice; the City never removed or impounded the signs. (Deposition of Rowe, p. 93.) Moreover, the City never fined Plaintiff for the sign violation. (Deposition of Rowe, p. 92-93.) Plaintiffs Complaint concerning Elyria's enforcement of the sign ordinance is limited to these events which occurred in December, 1994. (Deposition of Rowe, p. 93.) Plaintiff has not received a violation notice concerning the sign ordinance since 1994. (Deposition of Rowe, p. 97.) In this case, Plaintiff does not challenge the constitutionality of the 'City sign ordinance; rather, he cites this as another form of "harassment." (Deposition of Rowe, p. 96.)

(f) Charging an assessment for gas pump inspections that the county already does at no charge, and without an ordinance authorizing the City to do so until 1994

Plaintiff further alleges that Defendants have charged for gas pump inspections that the county already does at no charge, and without an ordinance authorizing the City to do so until 1994. Plaintiff' s Complaint, ¶ 10(j), (k).

Plaintiff's objections to the City's regulation of his Marathon gasoline service station are twofold. First, he claims that the City was performing inspections of gas pumps

without a municipal ordinance until 1994. This claim predates 1994. (Deposition of Rowe, p. 97.) Second, Plaintiff objects to the cost incurred by the City's inspection of the gasoline pumps, which takes about two hours of time and costs about $70 each year. (Deposition of Rowe, p. 99-101.) However, Plaintiff admits that the City has an interest in regulating the gasoline service stations within its jurisdiction. (Deposition of Rowe, p. 98-99.)

(g) Requiring unnecessary cosmetic changes to a building that was recently purchased by Plaintiff when such problems were present at the building when Plaintiff purchased said property

This allegation, set forth in Plaintiff's Complaint, ¶10(1), involves the same factual allegations addressed in Section 3, supra. (Deposition of Rowe, p. 101-102.)

(h) Assessing additional hidden charges before construction can commence but after application has been made and holding the permit thereby causing delays

Plaintiff further claims that Defendants "harassed" him by "assessing additional hidden charges before construction can commence but after application has been made and holding the permit thereby causing delays." Plaintiffs Complaint, ¶10(m). This claims concerns Plaintiff's expansion of his Marathon gasoline service station at 803 West River Road in 1999. (Deposition of Rowe, p. 105-106.)

The "additional hidden charge" which is the subject of Plaintiffs Complaint was a $24.96 fee for a sewer connection. (Deposition of Rowe, p. 107.) Plaintiff claims that the City

would not release the building permit for expansion until the sewer connection fee was paid. (Deposition of Rowe, p. 107-108.) This resulted in a delay of three or four days, which was largely self-imposed since Rowe objected to paying the sewer connection fee during that time. (Deposition of Rowe, p. 108-109.)

(i) Closing streets near Plaintiffs business rather than rerouting traffic during 1998, which caused losses to Plaintiff s business income

Plaintiff further claims that Defendants "harassed" him by closing streets near Plaintiff's business rather than rerouting traffic during 1998, which caused losses to Plaintiffs business income. Plaintiff s Complaint ¶10(n). This claim arises from the City's sewer construction projects at two sites along West River Road, at Route 57 and Fifteenth Street. (Deposition of Rowe, 114-115.)

Regarding this claim, Plaintiff admitted that although West River Road adjacent to the Marathon station was barricaded, local traffic was permitted and Plaintiff "used the road all the time." (Deposition of Rowe, p. 111.) Plaintiff was able to access the Marathon station daily via West River Road. (Deposition of Rowe, p. 111.) Further, customers could access the Marathon station from Furnace Road, as the Marathon is located on the comer of Furnace Road and West River Road. (Deposition of Rowe, p. 111-112.)

Plaintiff objected to the barricading of West River Road because in his opinion it was unnecessary. (Deposition of Rowe, p. 116.) Plaintiff felt that the City barricaded the road solely to harass him. (Deposition of Rowe, p. 116.) Finally, Plaintiff allegedly sustained a $55,000 loss in income

from the gasoline station's business as a result of the barricade. (Deposition of Rowe, p. 123.)

(j) Closing Plaintiff's business on July 4th from 6pm to midnight by blocking all access to traffic due to activities in the adjacent City park

Plaintiff also claims that Defendants "harassed" him by closing both Furnace Street and West River Road, the streets surrounding West River Marathon station, on July 4th from 6:00 p.m. until midnight due to holiday festivities in the adjacent City park. Plaintiff's Complaint, ¶10(o). Plaintiff alleges that the road closing over the July 4th holiday in 1996, 1997 and 1998 hurt his business. (Deposition of Rowe, p. 127.) Plaintiff's West River Marathon station kept business hours until 10:00 p.m., so the street closings for each July 4th holiday impaired Plaintiff's business for four hours at most. (Deposition of Rowe, p. 133.) Plaintiff has not produced any records substantiating his claim for damages, and he has no personal knowledge of exactly how much money his business has lost due to the July 4th road closings. (Deposition of Rowe, p. 134.) Plaintiff acknowledges that the purpose of the road closings was to facilitate the holiday festivities in the City park which is located next to Plaintiff's West River Road Marathon. (Deposition of Rowe, p. 130-131.

Plaintiff indicated in his deposition that Count One was brought pursuant to the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and based primarily on his contention that the City's regulation of his business constituted an unlawful taking of his property without compensation. Rowe Dep. at 13-15. To the extent Plaintiff claims a violation of his Fifth Amendment rights, that claim will be addressed *infra*, through discussion of Count Six, which specifically

alleges the unconstitutional taking of property. For the reasons stated in the court's discussion of that count, Defendants' motion for summary judgment on Count One should be granted. Based on his deposition testimony, Plaintiff does not appear to be making a claim that the City is selectively enforcing the Fire Alarm Ordinance No, 703.20 as compared with other business proprietors. (Deposition of Rowe, p. 27.) Rather, Plaintiff claims that the City's enforcement of a $25 charge per false alarm was costly to his business in that he had to expend $150-$200 in attorneys' fees for his lawyer to write a letter to contest every $25 charge. (Deposition of Rowe, p. 30). However, in his brief in opposition to Defendants' motion for summary judgment, he maintains he is asserting such a claim.

To the extent that Plaintiff's Complaint may be read to allege and prove a claim against the City and/or the Safety Services Director for selective enforcement, he must prove three things: (1) the state actor must single out a person belonging to an identifiable group for prosecution even though the state actor has decided not to prosecute persons who do not belong to that group under similar circumstances; (2) the actor must initiate the prosecution with a discriminating purpose; and (3) the prosecution must have a discriminating effect on the group to which the defendant belongs. *Stemler v. City of Florence,* 126 F.2d 856, 873 (6th Cir. 1997). The court in *Stemler* held that "it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated person outside of [plaintiff's] category were not prosecuted." *Id.* (citing *United States v. Armstrong,* 517 U.S. 456 (1996)). Moreover, "there is a strong presumption that the stat e actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary." *Id.*

Based upon his Complaint, Plaintiff has not established a prima facie case showing that the Council selectively enforced the ordinance against him. Neither in his Complaint nor in his response to Defendants' motion to dismiss has Rowe alleged that he belongs to any identifiable group which has been prosecuted while other similarly-situated persons outside Rowe's group were not prosecuted. Accordingly, Plaintiff has not established that the Defendants selectively enforced the City ordinance against him. Accordingly, Defendants' motion to dismiss Plaintiff's claims for selective enforcement against Defendants is hereby granted.

To the extent Plaintiff claims a violation of his Thirteenth Amendment rights, that claim will be addressed *infra,* through a discussion of Count Three, which specifically alleges involuntary servitude. For the reasons stated in the court's discussion of that count, Defendants' motion for summary judgment on Count 1 should be granted.

2. Second Claim for Relief (Civil Rights)

Rowe's second claim for relief, also characterized as a civil rights claim, alleges that Defendants have "engaged in a practice of intentionally interfering with the business of the Plaintiff," through the actions listed in Rowe's first claim. Complaint at ¶16. Rowe alleges that as a result of Defendants' acts, he has been deprived of the ability to earn a living without illegal interference, to work as an independent operator of a service station without malicious and illegal interference, and to work without a consciously practiced intentional pattern of discrimination against him. *Id.* at ¶17.

Plaintiff conceded during his deposition that his second claim for relief is "basically repeating the first claim." Rowe

Dep. at 143. As a consequence, summary judgment is entered in favor of Defendants on this count for the same reasons stated above.

3. Third Claim for Relief (Involuntary Servitude)

Plaintiff alleges in his third claim for relief that, as a result of Ordinance Number 96-41, which required him either to keep his tree lawn mowed or to pay a monetary penalty, Plaintiff has been subjected to involuntary servitude, in violation of the Thirteenth Amendment. Plaintiff urges that the Defendants' actions may be characterized as a "badge or incident of slavery," Complaint at ¶26, because Defendants are trying to make Plaintiff do something against his will. Rowe Dep. at 85.

The Thirteenth Amendment provides, in pertinent part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Supreme Court in *City of Memphis v. N.T. Greene,* 451 U.S. 100, 101 S.Ct. 1584 (1981), held that in order for a government action to be a cognizable violation of the Thirteenth Amendment, the action must be "fairly characterized as a badge or incident of slavery." *Id.* at 124-26, 101 S.Ct. at 1598. In *Greene,* the City of Memphis closed the north end of a two-lane city street which traversed a white residential community, the area to the north of which was predominantly black, thereby making access to some of the homes less convenient. *Id.* at 103,101 S.Ct. at 1588. The

Court held that the street closing's disparate impact on black citizens could not be characterized as a badge or incident of slavery, because the record disclosed no racially discriminatory motive on the part of the city's lawmakers. *Id.* at 126, 101 S.Ct. at 1599-1600.

When asked how the City's requirement that he mow his tree lawn put him in the position of an African American slave, Rowe responded that:

> Slavery is slavery whether you're white, black, Korean. Slavery is slavery. That's when the Government takes you and makes you do things on their property that is owned without compensation or fines you or penalizes you for not doing it. That's slavery, I'm sorry. In my eyes, that's slavery.

Rowe Dep. at 73. Rowe, a white male, has presented no evidence of racial motivations on the part of Defendants in the enactment or enforcement of the mowing ordinance, nor has he presented evidence that the City placed such severe restrictions on him or his ability to make a living such that it can be viewed as a badge or incident of slavery.

Rowe cited several cases within the body of his Complaint which he argues support his characterization of the lawn mowing requirement as a badge or incident of slavery. Rowe's reliance on these cases, however, is misplaced. The First Circuit in *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), did not in any way address the subject of involuntary servitude. In *Melson v. Kroger Co.,* 550 F. Supp. 1100 (S.D. Ohio 1982), the court limited its discussion of involuntary servitude to a holding that the plaintiffs had not stated a claim under the Thirteenth

Amendment, because they had not alleged facts indicating that Defendants' actions toward them were related to slavery. *Id.* at 1106. *Melson* cuts against Rowe's argument. Finally, while the court in *Callaghan v. Dep't of Fire,* 385 So.2d 25 (4th Cir. 1980) did hold that "[f]orcing a man to work against his will without pay is involuntary servitude," that court was specifically referring to a case in which the plaintiff was compelled to work without pay as a condition of his employment. *Id.* at 28. The facts of that case are distinguishable from those of the instant case, and it is therefore inapplicable.

Because Plaintiff cannot produce evidence to support his claim of involuntary servitude, Defendants are entitled to judgment as a matter of law. Accordingly, Count Three of Plaintiffs Complaint is hereby dismissed.

4. Fourth Claim for Relief (Conspiracy)

Plaintiff's fourth claim for relief charges Defendants with conspiring to injure and harass Rowe. The allegations contained in Claim Four refer specifically to the mowing ordinance and its enforcement, which Plaintiff claims was selectively enforced against Rowe and not others in the same locale. Complaint at ¶28.

Plaintiff does not make clear whether his conspiracy claim is brought pursuant to statute or common law. At common law, a civil conspiracy consists of "an agreement between two or more persons to injure another by unlawful action." *Collyerv. Darling,* 98 F.3d 211,229 (6th Cir. 1997). Under § 1983, upon which Plaintiff relies for his civil rights claims, a conspiracy is:

> [A] combination of two or more persons acting in concert to commit an unlawful act, or to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.

Miller v. City of Columbus, 920 F. Supp. 807, 822 (S.D. Ohio 1996).

In order to support a claim under § 1985(3), Plaintiffs must establish: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to either person or property or a deprivation of any right or privilege ora United States Citizen. *Volunteer Medical Clinic, Inc. v. Operation Rescue,* 948 F.2d 218,223 (6th Cir. 1991) (citing *United Bhd. of Carpenters & Joiners v. Scott,* 463 U.S. 825,828-29, 103 S.Ct. 3352, 3355-56 (1983)). Furthermore, it has long been established that "a necessary element of a § 1985(3) claim is the existence of some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (citing *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1970)).

Regardless of which avenue Plaintiff pursues, common to all is the requirement that he show some evidence of an agreement between conspirators to act in concert. Plaintiff asserts in his Complaint that:

> Defendants have conspired and have collectively engaged in conduct in such a way as to injure and harass Plaintiff by forcing him to mow a section of the city's property (the tree lawn) without due process, without proper verification of a violation of the aforementioned city ordinance, and by selectively enforcing said ordinance against Plaintiff but not others in the same locale and with same alleged violation of said ordinance. Said conduct was done via anonymous complaints to the city or from within the Safety-Service Department of the city by John Doe, an unknown defendant who may be employed by the City.

Complaint at ¶28. While Plaintiff's Complaint refers solely to the lawn mowing ordinance, Plaintiff stated in his deposition that his conspiracy claim refers to all of his claims in general. Rowe Dep. at 144. Plaintiff has done no more than allege that a conspiracy took place. When asked for specific facts to support his claim, Plaintiff simply refers back to his laundry list of complaints against the City. *Id.* at 145. Given the absence of any evidence of a conspiracy between any of the Defendants, Defendants are entitled to judgment as a matter of law with regard to Plaintiff's conspiracy claim. Accordingly, Count Four of Plaintiff's Complaint is dismissed.

5. Fifth Claim for Relief (Waste)

In Count Five of his Complaint, Plaintiff claims that by requiring unnecessary cosmetic changes to his property, assessing charges and withholding permits, Defendants have committed waste. The common law doctrine of waste has

never been recognized under Ohio law. *Woodrick v. Wood*, 1994 WL 236287 at *2 (Ohio App. May 26, 1994) (citing *Crockett v. Crockett*, 2 Ohio St. 180, 185 (1853)). Furthermore, Plaintiff has pointed to no statute under which his claim could survive. Defendants are entitled to summary judgment with regard to Plaintiff's waste claim, and Count Five of Plaintiff's Complaint is hereby dismissed.

6. Sixth Claim for Relief
(Unconstitutional Taking of Property)

Plaintiff claims in Count Six of his Complaint that Defendants' actions constitute an unconstitutional taking in violation of his right to just compensation and his right to due process. Complaint at ¶33. The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without .just compensation.

The Supreme Court has recognized two categories of takings: physical and regulatory. *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731,737 (6th Cir. 1997). A physical taking occurs where the government physically intrudes upon a plaintiff's property. *Id.* Where the governmental action constitutes a permanent physical occupation of plaintiff's property, then the action is a taking "without regard to other factors that a court might ordinarily examine, and without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 738 (quotations omitted). Rowe alleges that the City has assessed charges and fines against him, required various permits for construction and demolition, and closed streets temporarily, blocking traffic and limiting vehicular access to his business. Rowe has not alleged, through any of his claims, that the City physically

intruded upon his property, and therefore has not claimed a physical taking.

Thus, Rowe's takings claim must be based upon a regulatory taking theory. It has long been established that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922). The Supreme Court, rather than attempt to provide a set formula for determining whether a regulatory taking has taken place, has instead relied upon an "essentially ad hoc, factual inquiry." *Id.* (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992)). Factors which the court sees as particularly significant include: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations. *Id.* (citing *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1025-26 (1986)).

The Sixth Circuit has held that a regulatory scheme effects a taking if: (1) the regulations do not substantially advance legitimate state interests; or (2) the regulations deny an owner economically viable use of his land. *Michigan Chrome and Chemical Co. v. City of Detroit,* 12 F.3d 213, 1993 WL 432834 at *6 (6th Cir. Oct. 26, 1993). *See also, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1428 (9th Cir. 1996).

First, Rowe cannot show that the regulations of which he complains do not substantially advance legitimate state interests. It is beyond argument that any city has the power to enact regulations to promote the health, safety and welfare of

its citizens. For instance, Ohio Rev. Code § 723.01 gives municipalities the power to regulate the use of streets. Ohio Rev. Code § 715.27 allows municipalities to regulate the use of signs. Enforcing building codes, requiring construction permits, and closing streets are all within the City's police power.

Second, it cannot be said that the City's regulations, or its enforcement thereof, go "too far," such that they should be considered takings. The court in *Michigan Chrome* found that a landowner had not been deprived of every economically viable use of its land, because it continued to operate a business on its property. *Michigan Chrome,* 1993 WL 432834 at *6. The effect of the City's regulations on Rowe has been, to a large extent, minimal. Where Rowe argues that the City forced him to make cosmetic changes to his building, or put him on notice that his signs were in violation of a municipal ordinance, in fact he was never charged a fine by the City. Where Rowe complains that he was forced to pay "hidden charges" before construction could commence, he was actually charged a sewer connection fee of $24.96. Certainly Rowe is not being asked to shoulder the entire burden of regulations which benefit the citizens of Elyria as a whole. Most importantly, Rowe has not been denied the economically viable use of his land. He continues to operate a gas station and an ice cream parlor on his property.

Because Rowe cannot support his claim that the actions of the City of Elyria constitute an unconstitutional taking of his property, Count Six is hereby dismissed.

7. Plaintiff's Claims and Statute of Limitations

Finally, several of Plaintiff's claims are barred by the statute of limitations. In Ohio, Section 1983 claims are

governed by a two-year statute of limitations. *Browning v. Penndleton,* 649 F.2d 991 (6th Cir. 1989) (en banc); *Hull v. Cuyahoga County Joint Vocational School District Board of Education,* 926 F.2d 505 (6th Cir. 1991). Since Plaintiff filed his Complaint on June 29, 1999, any claim arising before June 29, 1997, is untimely.

Several of Plaintiff's claims arose before June 29, 1997. These include: assessment of false alarm charges in early 1997; warning Plaintiff to remove commercial signs from the tree lawn in 1994; charging Plaintiff for gasoline pump inspections; and closing the streets adjacent to Plaintiff's Marathon station on July 4, 1996. To the degree that these claims arose before June 29, 1997, they are dismissed as untimely.

8. Declaratory Judgment and Injunctive Relief

Because the court has herein determined that the City of Elyria has not violated any of Rowe's civil rights, Rowe's requests for declaratory and injunctive relief are not well taken. Therefore, Counts Seven and Eight of Rowe's Complaint are hereby dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss "Elyria City Council" (Doc. No. 20) and Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. No. 26) are granted, and the instant action is hereby dismissed in its entirety.

IT IS SO ORDERED.

/s/ _____
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 4 2002
CLERK

No. 02-349

In The

Supreme Court of the United States

HARLEY E. ROWE,

Petitioner,

v.

CITY OF ELYRIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This is a civil action monetary claim for alleged violations of Plaintiff's civil rights by the City of Elyria and various officials and employees.

In 1995, Mr. Rowe was prosecuted in a civil action to recover costs for false alarms at his business which generated responses by the City of Elyria Police Department to verify whether or not any potential criminal activity was taking place at Mr. Rowe's gas station. The court ruled that the City did not prove the alarms to be false. Mr. Rowe was subsequently prosecuted for failure to obtain a permit for his alarm system. As a result of that action and Mr. Rowe's laundry list of perceived harassment by the City, he filed his complaint in the Federal District Court for the Northern District of Ohio, Eastern Division.

The district court was presented with alleged federal questions pursuant to the Civil Rights Act, 42 U.S.C. Section 1983. The primary claim is based upon the City's purported violation of the 13th Amendment to the United States Constitution to wit: involuntary servitude which inflicted upon him a "badge or incident of slavery". The cause of the involuntary servitude and the badge or incident of slavery was the requirement that he mow the tree lawn in front of his property.

The Defendants filed Motions for Summary Judgment and to Dismiss, which motions were granted on November 30, 2000. The district court found that Mr. Rowe had not produced any genuine issues of material fact which would warrant sending the case to a jury.

Plaintiff has timely perfected his appeals to the Sixth Circuit Court of Appeals which affirmed the findings of the

district court and his appeal to this Court. Plaintiff in his Petition for Writ of Certiorari somewhat nebulously articulates three (3) reasons why this Court should grant the writ. They are:

1. The Decision of the Sixth Circuit is incorrect.

2. The Question Presented is Important.

3. The Decision of the Sixth Circuit Adversely Impacts Members of a Protected Class and Eliminates the Rights of All Persons under the 13th Amendment.

We shall endeavor to address these issues in order.

ARGUMENT

I. The Decision of the Sixth Circuit is Incorrect.

Plaintiff (Petitioner Harley Rowe) in this portion of his Petition for Writ of Certiorari amorphously discusses the requirements for Motions to Dismiss, Fed. R. Civ. P. 12(b)(6) and a Motion for Summary Judgment under Fed. R. Civ. P. 56. In the Sixth Circuit below, Mr. Rowe argued that the City was singling him out, i.e., selectively enforcing various city codes against only him. The Sixth Circuit correctly stated what a plaintiff must establish to prevail upon a claim of selective enforcement.

1. The Plaintiff must make at least a prima facie case showing that similar persons outside plaintiff's category were not prosecuted. *Stempler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997).

2. The public official must initiate the prosecution with a discriminatory purpose. *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (quoting *Futerneck v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir. 1996)).

3. The prosecution must have a discriminatory effect on the group to which plaintiff belongs. *Gardenhire* supra.

In the instant case, Mr. Rowe has completely failed to show that any persons outside his category were not prosecuted. Mr. Rowe argued that he provided a list of persons he *believed* (emphasis ours) were not prosecuted under the grass mowing ordinance. As the Sixth Circuit pointed out Mr. Rowe had a duty to come forward with evidence to support his claim. Second, Mr. Rowe has failed to show that anyone initiated a prosecution for a discriminatory purpose. Third, he has failed to show any discriminatory effect upon the group to which Mr. Rowe allegedly belongs. In fact, he never does establish, even in his pleadings, the group to which he purportedly belongs.

Mr. Rowe then argues that the City's mowing ordinance is unconstitutional on its face and as applied to him. The law favors a finding of constitutionality so long as a rational relationship exists between the terms of the ordinance and a legitimate governmental purpose. *Berger v. City of Mayfield Heights*, 154 F.3d 621, 624 (6th Cir. 1998). He has presented no evidence that the mowing ordinance was not serving a legitimate governmental purpose, i.e., aesthetics, vermin control and traffic safety.

Except for vague allegations that certain public officials were out to get him, Mr. Rowe articulates no facts upon which to predicate this portion of his claim. Mr. Rowe complains that the City cited his property for various maintenance code violations but admitted that the property did look "kind of rough", had peeling paint and holes in the parking lot. Plaintiff was served with notice of violations, renovated the property, and was never charged nor fined for the violations. Mr. Rowe was served notice of

violations of signage ordinances and voluntarily removed the portable lighted sign from his tree lawn, and the signs on the fence were ultimately determined to be on a City owned fence and the City removed them at its own expense. No enforcement action was taken. Plaintiff complained about inspection fees for gas pumps, but admitted that the City did have an interest in regulating gasoline service stations within its jurisdiction. Mr. Rowe complains that the City by closing West River Road for a sewer construction project damaged him. His argument that the road work could have been done without closing the road is merely a substitution of his judgment for that of the City Engineer.

Last, the only prosecution to which the Plaintiff was subjected was a violation of a city ordinance which required that a permit for the issuance of a burglar alarm be taken out before it was registered with the Police Department. Mr. Rowe refused to take out the permit, was prosecuted, found guilty and fined. He ultimately paid the fine.

II. The Question Presented is Important.

The main thrust of this argument seems to be that the mowing ordinance should be declared unconstitutional because there was no rational basis yet concedes that it would be constitutional unless it is arbitrary or unreasonable. See Petition for Writ, p. 6. However, he utterly fails to state why or how the ordinance is unreasonable or arbitrary. Presumably, he argues that it is being enforced against him alone as a "class of one" but he fails to demonstrate that others similarly situated have not been prosecuted. As such, his "class of one" claim should be rejected. His other argument is that a city official drove by and

determined by glancing the grass to exceed twelve (12) inches was arbitrary. Yet the Plaintiff admitted that he was; a) aware of the ordinance; b) it applied to his property; c) had no knowledge of whether or not the grass or weeds violated the ordinance; d) did not personally inspect the property. However, he made arrangements to mow the property, but did not do so within the five (5) days required by the ordinance. Thus, his arguments as to unreasonableness or arbitrariness fall short of a constitutional challenge.

III. The Decision of the Sixth Circuit Adversely Impacts Members of a Protected Class and Eliminates the Rights of All Persons Under the 13th Amendment.

Mr. Rowe raises for the first time that he is a member of a "class of one". See Petition for Writ of Certiorari, P. 6.

The issue of a protected class was not alleged in Plaintiff's complaint nor in response to defendant's motions. He has simply not articulated in any meaningful manner that he belongs to any identifiable group which has been prosecuted while other similarly situated persons were not prosecuted. Mr. Rowe is alleging that by requiring him to mow the grass in the tree lawn or pay a fine inflicts upon him a "badge or incident of slavery". This Court has addressed the issue of "involuntary servitude". In the case of *United States v. Kozminski*, 487 U.S. 931, 942 (1988) this Court found that involuntary servitude was not limited to the abolishment of African slavery but was extended "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." The Court went on to say:

> "Similarly, the Court has recognized that the prohibitation against involuntary servitude does not prevent the state or federal government from compelling their citizens by threat of criminal sanction, to perform certain civic duties. . . ," 487 U.S. at 943-44.

Thus, enforcement of a mowing ordinance does not rise to the level compulsion which is " . . . akin to African slavery which in practical operation would produce like undesirable results." 487 U.S. at 942.

The City of Elyria argues to this Court that Mr. Rowe's laundry list of perceived violations of his civil rights are nothing more than the complaints of a disgruntled citizen and none of his complaints rises to the constitutional level which he contends. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN J. GURCHIK
Attorney for City of Elyria, et al.